

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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Date: August 24, 1998
Case No: 97-INA-00471

In the Matter of:

ALBERTO'S MEXICAN RESTAURANT
Employer

On Behalf of:
FRANCISCO RODRIGUEZ-LUNA
Alien

Appearance: Susan M. Jeannette
for the Employer and the Alien

Before: Holmes, Jarvis and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Francisco Rodriguez-Luna ("Alien") filed by Employer Alberto's Mexican Restaurant ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On June 6, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Cook in employer's Mexican Restaurant.

The duties of the job offered were described as follows:

"Cook to prepare a wide range of Mexican menu items. Use and knowledge of standard restaurant equipment and utensils. Must be able to speak Spanish as the owner is recent immigrant legalized under IRCA, 1986 and so are many of the employees. They only speak Spanish as their native language. Must be able to schedule staff and handle inventory control."

An eighth grade education, and 2 years experience was required. Special requirements were: must be able to obtain a County of San Diego Foodhandler's card. Wages were \$8.00 per hour. (AF-8-143)

On July 11, 1995, the CO issued a NOF denying certification, finding that Employer's application was deficient on several grounds. Employer had rejected U.S applicant Maria Jones for other than lawful reasons in violation of 20 CFR 656.21(b)(6) and/or 656.21(j)(1). Employer's reports of recruitment results state applicant did not show up when in response to an EDD questionnaire she stated she did appear. Moreover, an interviewer was "Susan" who may have been alien's agent Susan Jeannette, which would have been a violation of 20 CFR 656.20 (b)(3)(I). Corrective action required documentation with specificity of lawful recruitment efforts of this applicant and that the alien's agent did not participate in the recruitment process. Secondly, the CO found Employer's response to a request for California ID raised the issue of proper insurance for the two separate business establishments that had not previously been shown. Corrective action required was evidence of Unemployment and Disability Insurance coverage for the employees at the 6101 University Ave. job site. Thirdly, the CO found the ETA-750 report incomplete. Corrective action required was submission of the type of visa permitting alien to enter the U.S.(AF-74-78)

Employer, July 17, 1995, forwarded its rebuttal, stating a

good faith effort had been made, and that the applicant in question, Maria Jones, had refused to go to the restaurant where the job opening was, but that Employer was able to hire her in one of her four other restaurants, as well as her husband and a teenage son. A statement from Maria Jones as to her status as an employee was included, along with her pleasure at working with Employer, and the desirability of the locations of the restaurants where she has served. The "Susan" involved was Susan Nelle and not Susan Jenrette; photographs and documentation of the two "Susans" were attached. Additionally, Employer, by its owner Sanjuana Rodriguez, stated that alien was in the U.S. as a temporary worker and has been waiting for seven years for his status to be adjusted as a Legal Permanent Resident. A copy of his Employment Authorization Document was attached. (AF-54-73)

On November 7, 1995, the CO issued an amended NOF which required Employer to correct deficiencies in its rebuttal. The CO found that since the sworn statement of applicant Maria Jones was that she had been hired as a cook the day after interview, even though immediately promoted to assistant and shortly manager, at the time of the application she was an able, willing, qualified and available U.S. worker. Therefore, certification was not proper (AF-40-42)

On November 11, 1995, Employer explained at length that Maria Jones did not accept the opportunity to schedule an interview when contacted by employer since the restaurant on University Ave. where the interview was to take place was in a neighborhood far from her home and was in a high crime rate area. Probably due to the undesirable location, this restaurant is still trying to fill the position of cook. (AF-36-39)

On January 9, 1996, the CO issued a Final Determination denying certification based on Employer having filled the position of cook for Alberto's Restaurant at 1601 University Ave. The CO stated: "The U.S. worker is clear in stating, in her sworn statement, that she was initially offered and accepted the cook's position. Thus, the job opportunity was filled by a qualified, available, and willing U.S. worker. The fact that the U.S. worker was offered and accepted the job offer is the controlling issue in this matter. That the U.S. worker may have later been promoted is not controlling. It remains that the instant application is not certifiable because the petitioned position was filled by a qualified U.S. worker." (AF-32-35)

In February 1996, Employer filed a request for reconsideration, which the CO was unable to locate. A resubmission was denied by the CO on July 2, 1996. Employer appealed to this Board on July 12, 1996. (AF-1-31) Included in the record was a sworn statement from Maria Jones, dated January 31, 1996, which concluded: "I hope that this declaration clears up the issue of whether or not I was duly interviewed the first time. I did not show up for my first interview, which was for the position as a cook for the University Ave. location, which was

scheduled for February 25, 1995. I did attend another interview for another location in mid April, 1995 and I was hired for the Miramar restaurant. I did not and do not want to work at 1601 University Ave. location due to the fact that the area is very undesirable. I am also aware that the position for a cook for the University Ave. location is still unfilled."

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Where the CO requests documents, they must be produced if it has a direct bearing on the issue and is obtainable by reasonable efforts. Written assertions which are reasonable and indicate their sources or bases shall be considered documentation which then must be given the weight they rationally deserve in making the relevant determination. Gencorp., 87-INA-659 (Jan. 13, 1988)(en banc).

We believe a genuine mistake of fact has occurred between the CO and Employer concerning the availability of Mrs. Jones, the one applicant the CO selected as potentially unlawfully rejected by Employer. If, as alleged by Employer, the job opportunity was exclusively for the University Ave. restaurant and that restaurant is indeed located in an undesirable location far from Mrs. Jones residence, her refusal to accept that position would be credible, even as she accepted another position with Employer. She thus could for purposes of certification of alien, be available and willing to work at the Miramar and/or Leucadia restaurants, but not at the University Ave. restaurant. Thus the inquiry is not necessarily whether the promotion of Mrs. Jones did or did not make her a qualified applicant for the job opportunity of cook as found by the CO, but whether the job opportunity was not for the entire company of five restaurants, as found by the CO but exclusively for the job location on University Ave.

On the other hand, Employer did not initially clearly state its intention to hold the job opportunity only at that University job site which led to the CO's confusion. Were this situation clearly established initially, it is entirely possible that the CO may have required further documentation for the position and of good faith hiring; for example, why cooks at other restaurants could not be moved to the University restaurant, or why other applicants were rejected.

We have not here decided whether the University Ave. Restaurant represents a separate job opportunity as contended by

Employer. If, on remand certification is not granted, the CO should issue another NOF an accordance with the findings of this decision.

ORDER

The Certifying Officer's denial of labor certification is vacated and this matter REMANDED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge